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No. 00-1244

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RALPH NADER, ET AL.,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioners submit this reply brief to address important misconceptions of law and fact in the respondent FEC's opposition brief. First, the FEC is wrong when it asserts that the exemption in 2 U.S.C. § 431(a)(B)(ii), which excludes support of *public* "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the general definition of "expenditures" regulated by the FECA, displaces the specific exemption in 2 U.S.C. § 441b(b)(2)(B), which permits the use of corporate funds only for *internal* "get-out-the-vote campaigns." Second, the FEC is wrong when it claims that candidate debates, which serve as forums for the solicitation of votes, are "similar" to nonpartisan activities designed to encourage individuals to vote and, therefore, may be sponsored by business corporations.

1. The First Circuit should have followed the basic principle of statutory construction "that a specific statute ... controls over a general provision ... particularly when the two are interrelated and closely positioned." *See HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981) (holding that a general exemption in the federal income tax statute was not applicable to the plaintiff hospital services organization because the income tax statute also set out specific exemptions relating to hospital service organizations). If it had done so, the Court of Appeals properly would have found that the narrow exemption in § 441b(b)(2)(B) is controlling. That provision only allows corporations to sponsor "get-out-the-vote campaigns" that are

aimed at their own stockholders and personnel. Section 441b(a) otherwise unambiguously prohibits such corporate contributions or expenditures in connection with any federal election, including corporate sponsorship of nationally televised candidate debates.

It is no answer to assert, as the Court of Appeals did, that the definitions of "contribution" and "expenditure" are flexible because Congress "defined them to 'include' certain uses and phrased the exceptions as enumerating activities that the terms 'shall not include.'" (App. 29a-30a). While the affirmative phrase "shall include" may articulate a non-exhaustive list, *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 246 n.3 (1986) ("*MCFL*"), the same cannot be said of the phrase "shall *not* include." Were the courts to adopt a canon of statutory interpretation that deemed the phrase "shall not include" to be merely illustrative, then carefully drawn exceptions to a general prohibition, such as those found in § 441b(b), would invite the enforcement agency to invent limitless exceptions of its own.

The carefully drawn exceptions to § 441b's general prohibition of corporate political spending do not create any ambiguity about the FEC's power to adopt the Debate Regulations and cannot justify judicial deference to the agency's interpretation of the FECA.

2. The FEC does not claim, and the Court of Appeals did not find, that the activities fostered by the challenged Debate Regulations *are* "nonpartisan registration and get-out-the-vote campaigns" within the meaning of § 441b(b)(2)(B).

Instead, the FEC has asserted that its regulation should be upheld merely because candidate debates "are *similar* in nature and purpose" to registration and get-out-the-vote activity. Resp. Br. 13; 44 Fed. Reg. 76,735 (1979) (emphasis added). At the same time, however, the FEC concedes that "an administrative agency ordinarily lacks power to announce exceptions to a facially unqualified and unambiguous statutory command." Resp. Br. 9. The authority given by § 441b(b)(2)(B) to grant exemptions for "nonpartisan registration and get-out-the-vote campaigns" does not create authority to grant exemptions for every remotely "similar" activity.

The conference committee report that the FEC relies upon merely recites that corporations should be permitted "to take part in *nonpartisan registration and get-out-the-vote activities*" aimed at the general public. Resp. Br. 12; H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63-64 (1976) (emphasis added). Even if this report were deemed to voice Congressional purpose, the conference committee pointedly did not express any intent to permit corporations to fund every activity that might incidentally encourage people to vote or register to vote. Wherever one draws the line around what constitutes "nonpartisan registration and get-out-the-vote activities," the candidate debates permitted by the FEC's Debate Regulations, which are structured to give selected candidates an opportunity to wage their campaigns before a national audience, fall well outside that boundary.

Resort to the general provisions of § 431(9)(B)(ii) makes no difference. Staging candidate debates cannot reasonably be deemed to be "nonpartisan activity designed to encourage individuals to vote or to register to vote." Indeed, recent presidential "debates" have featured alternating, rehearsed speeches by selected candidates, followed by closing statements in which candidates face the cameras and directly solicit viewers' votes. These debates constitute corporate-funded campaign activity that lies at the core of FECA's prohibitions. While candidate debates may incidentally encourage some people to vote or to register to vote, they are designed to give selected candidates a pivotal opportunity to advance their own campaigns in connection with federal elections. The First Circuit decision, allowing the FEC to breach the tenuous firewall between corporate money and the integrity of our elections, should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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